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COMPETITION CASES INVOLVING MORE THAN ONE COUNTRY

Preliminary note prepared by the UNCTAD secretariat
from inputs received from member States

Executive Summary

The present note contains summaries of important competition cases, with special reference to competition cases involving more than one country received from Argentina, Brazil, European Union, Kenya, Pakistan, Romania and the United States.

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Introduction

In the Agreed Conclusions adopted at its first session, the Intergovernmental Group of Experts on Competition Law and Policy requested the UNCTAD secretariat *inter alia* to publish on a regular basis "an information note on recent important competition cases, with special reference to competition cases involving more than one country, and taking into account information to be received from member States".[1]

This first note has been prepared pursuant to the above-mentioned request. It contains information on relevant cases as they have been submitted thus far by member States. It focuses on cases directly involving developing countries. Cases involving developed countries have also been brought out inasmuch as they have or may have implications for and/or an impact on developing countries' markets. The cases are classified by type of restrictive practice and according to the country or territory where investigation by a competition authority has taken place. The note is of a preliminary nature and is intended to be completed with further information made relevant by member States during the second session of the Intergovernmental Group, which is to be held in Geneva in June 1999. It can be consulted on our website at http://www.test.unctad.ch/cpdiscussion/index.htm.

Although the cases which are brought out in this note are limited in terms both of number and of countries covered, they permit to draw two conclusions with regard to the manner in which competition laws and policies have been operating:

(a) Competition laws and policies have had a triple, mutually supportive effect: (i) *prevention/deterrence* of restrictive practices, by inducing firms to adapt their behaviour to existing legislation and to bring out to competition authorities potentially controversial practices so as to make sure that such practices do not constitute departures from current legislation; (ii) *sanction* against and rectification of restrictive practices which violate existing

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[1] See TD/B/COM.2/13 and TD/B/COM.2/CLP 5, Annex I, para. 8 (iv).

legislation; and (iii) *follow up* of cases which, although not constituting restrictive practices *per se*, could eventually become so.

(b) In making their decisions, competition authorities have regularly taken into account (and indeed have expressly mentioned this in their consideranda) the impact that their ruling could have on the efficiency and economic viability of the enterprises whose practices have been examined. In so doing, competition authorities have successfully made relevant legislation not only compatible with, but also supportive of efforts aimed at improving the efficiency and productivity of the domestic economy.

A. **Economic concentration**

(a) Brazil

(i) In 1997, Electrolux Ltda., the Brazilian affiliate of the Swedish multinational, notified Brazil's competition authority -- CADE -- of its intention to acquire 40 per cent of the ordinary shares of Refrigeraçâo Paraná S/A - Refripar, a move which would enable Electrolux to obtain control of the voting rights of Refripar. In the course of the examination, CADE found out that, in 1994, i.e. prior to the proposed acquisition, a joint-venture agreement had already been entered into between Electrolux and Refripar whereby the former acquired 10 per cent of the shares of the latter and came to control Refripar's production in particular of washing machines. By virtue of the joint-venture agreement, Electrolux also became a member of the management board of Refripar.

CADE noted that, although the joint-venture agreement should have been submitted to the consideration of CADE, the non-notification did not appear to be a deliberate attempt by the parties involved to conceal the agreement.

After examining the case, CADE concluded that, even though competition might potentially be affected by the proposed acquisition, the actual competition was not

likely to suffer therefrom: other foreign enterprises with similar weight to that of Electrolux were entering the Brazilian market and were undertaking major investments therein. CADE further stressed that the local market for household electric products was growing significantly, thus allowing for this type of concentration without detriment to competition.[2]

(ii) In 1997, Colgate-Palmolive (a transnational corporation based in the United States) and Itap S.A. (a Brazilian enterprise) announced to CADE the intention of the former to acquire 49 per cent of Dental-Pack Indústria e Comercio Ltda., owner of the latter.

In examining the proposed acquisition, CADE took into account that Colgate-Palmolive already had 51 per cent of the voting capital of Dental-Pack, and was thereby already in a position to appoint the managers and formulate the commercial strategy of Dental-Pack. As a result, with the acquisition, there would be neither a modification of the centre of decision making nor a change in the dynamics of the competition of the relevant market. CADE thus asserted that the acquisition would not have a negative impact on the functioning of the market, the likely impact being rather in terms of benefits to be derived from internal reorganization and from the ensuing cost reductions. CADE concluded that the acquisition responded to a strategy of internal growth by Colgate-Palmolive, which was compatible with Brazil's antitrust legislation.[3]

(iii) Honda do Brasil, a subsidiary of the Japanese transnational, acquired in 1997 60 per cent of the capital of Motogear and 27 per cent of Motogear Norte, a subsidiary of the latter. By that operation, Honda secured the full ownership of Motogear and the control of the latter. These two enterprises were active in the market for the supply of parts for 4-wheel and 2-wheel vehicles. At the moment of the operation, Motogear was the main supplier of Agrale, a local competitor of Honda.

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2 CADE, *Relatório Anual 1997*, Brasilia, 1998, pp. 95-97.

3 *Idem*, pp. 94-95.

The question considered by CADE related to whether a formal commitment should be requested from Honda to maintain the flow of deliveries to Agrale. CADE asserted that such a formal commitment was not necessary, the reasons involved being the following:

(i) Motogear had already sent to CADE a written statement whereby it would continue to guarantee the supply of parts to Agrale;

(ii) With regard to the market for 4-wheel vehicle parts, there existed a reasonable number of competitors with a relatively large market share;

(iii) With regard to the 2-wheel vehicle parts, the vertical integration involved in the acquisition responded to a legitimate search for efficiency improvement and cost reduction in the production of 2-wheel vehicles;

(iv) Agrale had sent a letter to CADE accepting the customer relationship with Motogear under the new situation;

(v) The operation constituted merely one further step in a process of vertical integration which had begun in 1981, when Honda acquired 40 per cent of the equity capital of Motogear and 27 per cent of Motogear Norte.[4]

(iv) Smithkline Beecham, a U.K. pharmaceutical, had acquired in the United States the control of Sterling, an American firm. Brazil's competition authority, CADE, deemed it necessary to look into the operation since both enterprises had branches in Brazil and, therefore, the acquisition might have implications for the domestic market.

In examining the case, CADE took into account that: (i) the products traded by the two firms in Brazil had different characteristics; (ii) consumers had shown their preferences for the different products and, therefore, the acquisition would not be likely to alter the market segmentation; and (iii) there existed other competing brand names available

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4 *Idem*, pp. 107-110.

in the market, both from firms established in Brazil and from imports. The acquisition, it was further asserted, would encourage competitors to review their policies concerning prices, product range and product quality, and this would stand to benefit the domestic consumers. CADE thus put forward no objection to the operation.[5]

(b) Kenya

Smithkline Beecham is a limited private company incorporated in Kenya which started its operations in February 1974. It is a whooly-owned subsidiary of Smithkline Beecham PLC which is an English public company quoted on the London Stock Exchange. On 1 November 1994, Smithkline Beecham PLC acquired on a worldwide basis Sterling Products International Inc. Smithkline Beecham PLC owns 100 per cent shareholding in Smithkline Beecham (Kenya Ltd.). Sterling Health is a company formed under the laws of the State of Nevada in the United States and is also incorporated in Kenya. It is a subsidiary of Sterling Products International Inc. Essentially, the two firms deal in the manufacturing of pharmaceutical and nutritional health are products.

Smithkline Beecham Ltd. applied to the Minister for Finance of Kenya through the Monopolies and Prices Commission to acquire Sterling Health Ltd. on 6 June 1995 in accordance with the relevant provisions of Restrictive Trade Practices, Monopolies and Price Control Act of Kenya. The reasons advanced for acquisition were: (i) acquisition worldwide in 1994 of all the assets of Sterling Products International meant that all their subsidiaries had to come together; (ii) the acquisition would enable the integrated business to deliver added value to consumers by maintaining quality services to customers.

Investigations were carried out by the Monopolies and Prices Commission of Kenya to find out whether the implications of such an acquisition would have any adverse effects on competition considering that:

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5 *Ibidem*, pp. 110-112.

(a) Increment in market share could easily lead to a significant loss of competition;

(b) An acquisition of this kind could be disadvantageous in the sense that once a firm has acquired market power, it may restrict entry of new competitors into the existing market;

(c) It could also be disadvantageous if it does not promote the interests of consumers, purchasers and other users of goods and services with regard to prices, quality and variety of goods.

Investigations came up with the following findings:

- From the product comparisons undertaken, it was established that the companies in question dealt mainly in similar goods only in the area of pharmaceutical production;

- Sterling Health has a range of family health curative and preventive drugs such as Panadol, Hedex, etc.;

- Smithkline Beecham is strong in producing health drinks and oral care products such as Lucozade -- an area of production in which Sterling Health does not participate;

- This line of business is highly competitive as regards local concerns -- for example, E.A.I., Henkel, Rhône Poulenc, imports from India and other Far East countries;

- Smithkline Beecham International had already entered into agreements for the investment of US$ 2.5 million for upgrading plant and equipment facilities in Kenya;

- Sterling Health had set up good distribution facilities in neighbouring countries as it had invested earlier than Smithkline Beecham. Therefore, it was taking advantage of such facilities to improve on turnover in regional markets;

- In the Kenyan market, the share of the two merging firms was 12 per cent (Smithkline Beecham (K) Ltd., 4 per cent, Sterling Health, 8 per cent). This share of the market is below the 33.3 per cent (trigger point) stipulated by the Kenyan Restrictive Trade Practices, Monopolies and Price Control Act under section 23, and therefore does not lead to unwarranted concentration of economic power.

As a result of the investigations, it was concluded that the takeover was not likely to compromise competition in the said product market, but would promote efficiency in marketing, production, distribution and investment and also set strategies for expansion and development of human resources to facilitate staff mobility. Therefore, on 11 August 1995, the Kenyan Minister for Finance approved the takeover in accordance with the relevant section of the Restrictive Trade Practices, Monopolies and Price Control Act.[6]

(c) Romania

(i) Eurotrading Chemicals, a private foreign-owned (99.8 per cent) enterprise, notified the takeover of 51 per cent of three trading undertakings (Azomures, Amonil and Turnu). The Competition Council recalled that the Law prohibited economic concentrations which create or consolidate a dominant position and which lead or are likely to lead to restraining of competition. The Competition Council further took into account that the undertakings involved held a market share of 68 per cent. The Council found that such economic concentration created a dominant position and was likely to lead to a significant distortion of competition. The Council thus refused to authorize the economic concentration filed by Eurotrading Chemicals.

(ii) A merger was notified to the Competition Council by Multinational Corporate Investment Romania (a foreign legal person registered in British Virgin Islands) and Alexandre Pandelli Company, whereby the newly created undertaking -- Corporate Investments -- would be trading Kia vehicles and Dunlop tyres and would extend its business line so as to cover imports and trade of lubricants, auto supplies and cosmetics.

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6 Information provided by the Government of Kenya.

In its ruling, the Competition Council took into account that the proposed merger would not create or consolidate a dominant position, but rather would enhance efficiency by using a single distribution network. The Council further deemed that the operation would lead to cost reductions and lower retail prices.

(iii) An announcement was made in the media of a joint venture between Philips Lighting Holding (a subsidiary of the Dutch multinational) and Elba Street Lighting. The joint venture would relate to the production, assembling and trade of street lighting products. The products would be traded both inside and outside the Romanian market.

In examining the case, the Competition Council took into account that: (i) the market for street lighting products in Romania was growing; (ii) consequently, even if the new joint venture held a major market share, it would not be able to abuse of its dominant position because of potential strong competition; and (iii) the investment involved would increase efficiency in the production and trade of the products involved. The Council thus decided to authorize the joint venture.

(iv) On 1 September 1997, SAB International Management requested the Competition Council permission to conclude a merger related to the beer market with three other undertakings: Ursus, Pitber and Vulturul. The undertakings involved in the merger belonged to the South African Breweries (SAB). The Competition Council asserted that the proposed economic concentration did not create nor consolidate a dominant position on the beer market of Romania and, accordingly, authorized the merger.

(d) European Union

(i) ***Gencor/Lonrho***

On 24 April 1996, the European Commission decided to declare that the proposed merger in the platinum sector between Impala platinum, controlled by the South African

company Gencor, and Lonrho Platinum Division (LPD), a subsidiary of the British Company Lonrho PLC, was incompatible with the Common Market.

Both Gencor and Lonrho have substantial operations in the European Union. The Commission considered that the merger would lead to the creation of a duopoly which would dominate the world market for platinum and rhodium as a result of whicheffective competition would be significantly impeded in the Common Market.

The parties argued that a relatively low proportion of their sales took place in the Common Market and the operation would, therefore, have only a minor impact on the Common Market. However, the platinum market is a world market and prices for platinum are set at the world market level. Consequently, anticompetitive effects of the operation in the platinum would be felt in the European Community, for example through higher prices, for all the platinum sold in Europe. The merger between Gencor and Lonrho would have enabled the two companies to reach roughly the same market shares in the platinum market as the other South African Group, Amplat (Anglo-American Platinum Corporation), i.e. approximately 35 per cent each, the other major supplier being Russia with an approximate market share of 25 per cent. Half of the Russian supplies come from stocks. In addition to this situation with regard to market shares, the market for platinum has special features which increase the potential for the existence of a dominant duopoly:

- Only 20 per cent of the trade in platinum is transacted in the exchanges of London, New York and Tokyo. The bulk (80 per cent) of the trade is determined by long-term contracts;

- The demand for platinum in its three major fields of application is inelastic at current prices, since there are virtually no substitutes for platinum. The three major uses for platinum are jewellery (38 per cent), the manufacturing of motor car catalytic converters (32 per cent) and industrial catalysis applications (20 per cent), particularly in chemicals, glass manufacturing and the production of liquid crystals for television and computer screens;

- Purchasers have a very limited margin for negotiations and clearly no countervailing buyer power;

- On the supply side, the absence of genuine alternatives is an important factor, especially given the distribution of world reserves. The South African groups control 90 per cent of world reserves, the remaining 10 per cent being located in Russia. Since Russia started in 1990 to lower its stock levels, these stocks may be reduced to almost zero by the end of the century;

- Over recent years, two main elements have contributed to the relative fall in platinum prices: the Russian stock liquidation and Lonrho's relatively low production costs. Lonrho's absorption in the planned merger would therefore have led to less competition in the market.

It is worth underlining that, from the outset of the procedure, the South African authorities were kept informed by the Commission of developments in this case and attended the hearings organized in Brussels.[7]

(ii) ***Boeing/McDonnell Douglas***

On 30 July 1997, the European Commission in the context of the Boeing/McDonnell Douglas case, declared that the concentration was compatible with the Common Market and the functioning of the EEA Agreement.

This case which led to the creation of the largest aerospace company in the world, gave rise to an indepth investigation in view of its impact on competition. The company resulting from the merger held a market share of more than 60 per cent of the world market for commercial jet aircraft with more than 100 seats. A market which is extremely concentrated since, following the operation, only one competitor -- Airbus -- remained. Boeing already dominated the market and its position was strengthened by various factors

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[7] EC Report on Competition Policy, 1996. See also EU Press Release IP/96/346 dated 24 April 1996.

such as the immediate increase in its market share and order book. Other essential elements helped to strengthen its dominant position. the main ones identified by the Commission include the leverage effect with users of McDonnell Douglas (MDD) aircraft, the enhanced opportunity to enter into long-term exclusive supply deals with airlines, the merger patent portfolios and the technological "spill-over" benefits to the company's defence and space activities resulting from public funding of R&D programmes.

In view of the lack of potential entrants (no other aircraft manufacturer was interested in acquiring the activities concerned), Boeing offered commitments which basically concerned the cessation of exclusive supply deals, the "ring-fencing" of MDD's commercial aircraft activities and licensing of patents to third parties. An annual report is also to be submitted to the Commission on R&D projects benefiting from public funding. Since this package of measures was deemed adequate to resolve the resulting competition problems, the Commission decided to give the merger a conditional go-ahead.

The case, which was examined on both sides of the Atlantic, proved particularly sensitive because of the important interests involved, both in civil and military terms and because of its economic repercussions on competition. Throughout the European Commission proceedings, the case received considerable attention from the media which focused on the State interests at stake. The Commission reached its decision after carrying out an analysis based on the European Union's merger control rules and in accordance with its own practice and the case-law of the European Court. Numerous contacts and consultations took place, particularly between the member of the Commission with special responsibility for competition and the Federal Trade Commission within the framework of bilateral agreement on cooperation in competition matters between the European Union and the United States Government. During its indepth investigation, the Commission notified the United States authorities of its initial conclusions and concerns and called on the Federal Trade Commission to take account of the European Union's important interest in safeguarding competition on the large commercial jet aircraft market. After the Federal Trade Commission decided not to oppose the merger, the United States Government informed the Commission of its concerns regarding a possible decision to prohibit the proposed merger,

which could undermine the United States' defence interests. The Commission took its concerns into consideration to the extent consistent with EU laws, and limited the scope of its action to the civil side of the operation, including the effects of the merger on commercial jet aircraft resulting from combining of Boeing and MDD's defence interests. In spite of the difficulties inherent in this case, the conditional authorization given by the Commission on completion of its investigation was therefore a satisfactory solution which maintained effective competition on the market for large jet aircraft.[8]

(iii) ***Kimberly-Clark/Scott Paper***

This case involved a merger of United States-based paper product firms that prompted antitrust investigations in several countries, including the United States, Canada, Costa Rica, Mexico and the European Union (EU) and resulted in remedial divestiture orders in several countries, including the EU. Here we study the developments of the case in the European Union.

On 16 January 1996, the EU's approval was granted only after the parties agreed to make substantial modifications to the merger in Ireland and the United Kingdom. The result of these modifications was that Kimberly-Clark would not be able to combine its own Kleenex and Scott;s Andrex branded consumer tissue business in the United Kingdom and Ireland.

Kimberly-Clark and Scott Paper are major tissue paper and related product manufacturers with worldwide businesses in the consumer and industrial (away-from-home) areas. Post-merger, the surviving Kimberly Clark Corporation becomes number one tissue paper producer at both the world and European levels.

Tissue paper markets are not very highly concentrated in Europe. In fact, the Commission concluded that after the merger, Kimberly-Clark would have less than 20 per cent of primary tissue paper production capacity in Western Europe. Nevertheless, the

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[8] EC Report on Competition Policy, 1997.

operation gave rise to concerns in the United Kingdom and Irish markets for the following consumer tissue products: toilet tissue, kitchen towels and facial/hankies.

Because of the bulk and low value of consumer tissue products, which give rise to high transfport costs, and differences as regards particular brands and consumer preferences, the United Kingdom and Ireland were found to constitute separate geographic reference markets. Through the concentration, Kimberly-Clark would have combined the two leading brands in Ireland and the United Kingdom, namely, Scott's Andrex and Kimberly-Clark's Kleenex businesses. The parties global share, i.e. branded plus private-label products, lies between 40 and 60 per cent for each of the three relevant product markets. The parties aggregated market share for branded consumer products is lower and varies between 20 and 45 per cent. Private label products (i.e. sold under the retailer's name) play an important role in the United Kingdom and Irish markets, and now in fact cover more than half of market demand. The parties' control of the two leading brands, which are essential brands for retailers to stock, coupled with their position as the leading supplier of private-label products and overall market strength, made the creation of a dominant position likely. In particular, the Commission was concerned that, if the merger were to go through unmodified, there would no longer be sufficiently strong inter-brand competition.

The parties agreed to divest all of Kimberly-Clark's existing branded consumer toilet tissue business sold under Kleenex *Double Velvet*, *Quilted* and *Recycled* brands. In order to allow the acquirer sufficient time to establish these brands in the United Kingdom and Irish markets, the purchaser would be able to make use of the Kleenex umbrella trademark for a maximum 10-year period and Kimberly-Clark has undertaken not to re-enter the market with the Kleenex trademark for a minimum 15-year period. Similar arrangements apply for Kimberly-Clark's branded consumer kitchen towel business.

The parties also agreed to divest Scott's *Scotties* and *Handy Andies* brands for facials and hankies respectively and undertook not to use the Andrex trademark for consumer facials and hankies for an indefinite duration in the United Kingdom and Ireland.

The parties furthermore agreed to divest Kimberly-Clark's 80,000 tonnes-per-year tissue facility at Prudhoe in England, comprising the tissue mill, the converting factory and the consumer tissue products converting equipment to support the above businesses, as well as the warehousing, offices and the adjacent regional distribution centre. Through the divestment of the Prudhoe mill, Kimberly-Clark's residual tissue paper production capacity would fall to below 40 per cent of overall capacity in the United Kingdom and Ireland. The Prudhoe mill is a modern facility currently producing all of Kimberly-Clark's branded consumer toilet tissue and kitchen towel business. It is the only plant in the United Kingdom producing tissue paper using through-air-dry (TAD) technology, which is capable of producing the highest quality toilet tissue.[9]

(iv) **Samsung Electronics/AST Research**

In 1996, the Korean company Samsung Electronics acquired control of AST Research, Inc., an American company involved in the personal computer market. The concentration was notified to the European Commission in April 1997, whereas the deadline for the notification of a concentration in the European Union is only one week after the acquisition of the controlling interest. The Commission further argued that Samsung had also breached the Merger Regulations requirement that a merger must not be implemented until it has received prior authorization from the Commission.

The Commission ruled in particular that no damage to competition had been caused, that the parties finally notified the operation and that the infringement appeared not to be intentional. In the light of these considerations, the Commission decided to limit the sanction to Samsung to a fine of ECU 33,000.-.[10]

(v) **Coca-Cola/Cadbury-Schweppes**

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9 EU Report on Competition Policy, 1996.

10 European Commission, *Competition Policy Newsletter*, June 1998, pp. 71-72.

In late 1998, Cadbury Schweppes (U.K.) announced that it planned to sell its non-U.S. soft drinks to Coca-Cola (U.S.), with the exclusion of the bottling operations. The deal was submitted to national competition authorities of several countries, some of which (e.g. Ireland and Finland) gave approval, while others, such as Australia, Germany, Mexico and Spain, are still scrutinizing the transaction and have raised objections thereto.

In April 1999, the Euorpean Union's competition authority warned Coca-Cola that it would be subject to heavy fines unless it submitted the planned acquisition for EU approval. The European Union stressed that it had the authority to approve mergers which involve a total global turnover exceeding Euro 5 billion (around US$ 5.3 billion) if at least two of the merging companies had a combined turnover within the EU which amounts to more than Euro 250 million (around US$ 265 million). In calculating the value of the transaction, Coca-Cola had excluded income derived from the bottling operations, thus making the deal to fall below the threshold for EU scrutiny. the European Union countered that the bottling operations had to be included in the valuation of the deal.[11]

(e) United States

On 13 July 1998, a proposed consent decree was filed in the United States District Court for the District of Columbia according to which three major communications firms (Sprint Corporation, France Télécom and Deutsche Telekom A.G.) agreed to alter their US$4.5 billion business deal in order to resolve United States antitrust concerns. The Justice Department's Antitrust Division had alleged that the three firms' deal to provide global telecommunications services could reduce competition in international telecommunications by placing other United States telecommunications firms at a competitive disadvantage.

At issue was a plan by France Télécom and Deutsche Telekom to purchase US$4 billion of stock in Sprint and form a joint venture with Sprint to provide global telecommunication services, including the transmission of data, voice, and other enhanced telecommunications services.

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[11] See *Financial Times*, 29 and 30 April 1999.

Sprint, which is a United States company, is a major provider of long-distance telecommunications services, with US$12.6 billion in annual revenues. France Télécom, headquartered in Paris, is the monopoly provider of telecommunications in France and is the fourth largest provider of telecommunications in the world, with 1994 revenues of US$28 billion. Deutsche Telekom, headquartered in Bonn, is the monopoly provider of telecommunications in Germany and is the second largest provider of telecommunications in the world, with 1994 revenues of US$44 billion. The United States Antitrust Division maintained that the legal monopoly rights of France Télécom and Deutsche Telekom and their market power in France and Germany could be used by them to place United States telecommunications providers at a competitive disadvantage to Sprint and the joint venture in international telecommunications services between the United States and France and Germany, as well as the emerging market for international network services.

Under the terms of the proposed settlement, Sprint and the joint venture of the two European firms will not own, control, or provide certain services until competitors have the opportunity to provide similar services in France and Germany.

They are also barred from:

- obtaining anticompetitive advantages from their affiliation with France Télécom and Deutsche Telekom, such as more favourable access to France Télécom's and Deutsche Telekom's telecommunications networks in France and Germany; and

- gaining proprietary information or pricing data about their United States competitors that France Télécom or Deutsche Telekom may have gained through their relationships as suppliers of critical services to Sprint's and the joint venture's competitors.

In addition, France Télécom or Deutsche Telekom would be barred from limiting access to their public telephone and data networks in such a way as to exclude competitors of Sprint and the joint venture.[12]

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[12] Antitrust and Trade Regulation Report, Vol. 69, 20 July 1995.

B. Vertical restraints including dominant position

1. *Obstruction to market access (including exclusive dealing)*

(a) Argentina

A complaint was filed by American Express Travel Related Services and American Express Argentina S.A. against Visa International, Visa Argentina S.A., Mastercard International and Argencard S.A. The complaint related to an alleged threat of obstruction to market access and was based on decisions reportedly taken by American Express in third countries (from the European Union, Asia and the United States) to exclude automatically from its network those banks which issue Visa and/or Mastercard cards (in addition to American Express cards).

Argentina's National Commission for the Defense of Competition (CNDC) found out that the above-mentioned practice had been resorted to by the defendant in other countries, but asserted that such practice had not been applied in Argentina. The CNDC, however, warned against the adverse consequences that such a practice could have if resorted to in Argentina, as it would constitute anticompetitive behaviour aimed at hindering market access to potential competitors, thereby affecting the general economic interest. In the light of the outcome of the enquiry, Argentina's Secretary of Industry, Commerce and Mining requested the CNDC to carry out a periodic follow-up of the functioning of the credit card market in the country.[13]

(b) Brazil

In 1997, the Companhia Nitro Química do Brasil acquired from Bayer S.A. (a German transnational) the full ownership of Mineraçâo Floral, a producer of fluorspar. The

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[13] Argentina's National Commission for the Defense of Competition, Memoria Anual 1997, Buenos Aires.

acquisition was examined by Brazil's competition authority, i.e. the Conselho Administrativo de Defesa Econômica (CADE), as it could lead to a strengthening of dominant position through the possible restriction of supplies.

CADE asserted that, by acquiring Mineraçâo Floral, the Companhia Nitro Química would establish a dominant position in the market for fluorspar. Depending upon the firm's strategy, the production of this input could either be stopped or drastically reduced, with the ensuing prejudice for its clients.

In the light of these considerations, CADE deemed necessary to have a permanent follow up of the behaviour of Companhia Nitro Química do Brasil so as to prevent any prejudice to the market. CADE then imposed a number of safeguard measures with a view to ensuring that the acquisition was in conformity with the country's anti-trust legislation. The safeguard measures involved a commitment by Nitro Química to:

(i) guarantee the same supply conditions to clients as those which prevailed before the acquisition;

(ii) carry out the investments necessary for maintaining the supply of relevant products in the same technical specifications as those provided before the acquisition of Mineraçâo Floral;

(iii) import the inputs necessary for maintaining the quality and regularity of the supply of fluorspar so as to meet the demand of the clients of Mineraçâo Floral; and

(iv) maintain the same supply conditions for the customers of Nitro Química as they existed prior to the acquisition.

CADE further decided to carry out a follow up of the compliance of the above-mentioned safeguard measures every six months up to the year 2004. It was finally decided

that any complaint concerning alleged unequal treatment on the part of Nitro Química would be given priority attention by CADE.[14]

(c) Kenya

This case was highlighted in the Kenyan media in the first quarter of 1997. R.J. Reynolds complained that distributors and stockists were being threatened and forced not to stock the Aspen brand of cigarette (R.J. Reynolds' only product in Kenya). This was a case of exclusive dealing, where British American Tobacco did not allow its distributors to stock products from other competing manufacturers.

Background of tobacco industry in Kenya

There are three main firms dealing with tobacco products in Kenya -- two manufacturing in the country itself and one importing all its products.

British American Tobacco (B.A.T.) is a multinational company which has been operating in Kenya since 1907. The company has grown through the years, replacing almost entirely all cigarettes and other tobacco products previously imported into Kenya. B.A.T. commands above 85 per cent of the total cigarette market in Kenya.

Mastermind Tobacco (K) Ltd. is a local indigenous company which started the manufacture and selling of cigarettes in Kenya around 1989. Being a local company, it encountered stiff competition from B.A.T., which is a multinational with long experience both in the tobacco leaf production and cigarette manufacturing.

R.J. Reynolds is an international American company which entered the Kenyan market in 1996. It imports its products for sale from outside the country, since it does not have a manufacturing unit in Kenya.

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[14] CADE, *Relatório Anual 1997*, Brasilia, 1998, pp. 90-93.

Case events:

R.J. Reynolds complained to the Monopolies and Prices Commission (MPC) that:

- Its marketing materials, including billboards and posters had been uprooted by B.A.T. representatives and sales agents;

- Stockists were being threatened by B.A.T. representatives and/or sales agents.

The Commission contacted B.A.T. representatives in the field and their response was as follows:

- B.A.T. denied influencing distributors and stockists against selling rival brands;

- B.A.T. has a "gentleman's agreement" with its distributors to stock only B.A.T. products;

- Difficulty experienced in entering the distribution network by other companies was as a result of stockists' and distributors' satisfaction with B.A.T.;
- B.A.T. has exclusive rights on stands where its products were displayed and sold, since the company had signed an agreement with specific operators allowing them to stock only B.A.T. products;

- Kiosk owners and others can stock other products of their choice.

The Monopolies and Prices Commission of Kenya embarked on investigations to verify the allegations by R.J. Reynolds and came up with a report on the following lines:

1. Sales representatives from B.A.T. removed posters and billboards of R.J. Reynolds;

2. B.A.T. sales representatives threatened distributors and cautioned those stocking other products apart from those of their company;

3. B.A.T. actually stopped supplying to those who stocked the Aspen brand of cigarettes.

As the MPC was in the process of informing B.A.T. in writing that specific evidence was available to implicate them and would require B.A.T. to comment on the allegations, indicating how they proposed to bring their trade practices into conformity with relevant provisions of law, the Director of R.J. Reynolds advised the MPC that there had been a change on the part of B.A.T. (K) Ltd., and that the threats no longer existed. The case was therefore halted.[15]

(d) Romania

(i) Romania's Competition Council conducted, in 1997, an enquiry into alleged exclusive distribution contracts by Suchard Romania to the distributors of its products. The enquiry indicated that the company had signed 39 deeds of conveyance, authorizing buyers as exclusive distributors and forcing them not to market similar products or other companies' products. The contracts stipulated *inter alia* that the buyers were committed "not to represent other companies which manufacture or trade the same category of products" and "not to market other companies' products which are similar [to Suchard's] products".

The Competition Council ruled that the contracts stood for deliberate agreements which had as their object or might have as their effect the restriction, prevention or distortion of competition on the country's candy market, in particular: (i) concerted fixing of selling prices and of discounts; (ii) restriction or control of distribution; and (iii) elimination of other competitors, restriction or prevention of market access. The Council further ruled that such practices were in contravention of the country's Competition Law.

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15 Information provided by the Government of Kenya.

(ii) Romania's Competition Council ruled that the proposed exclusive distribution contract was in line with relevant provisions of the law on the granting of exemptions from the prohibition of exclusive distribution stipulated in article 5 of the Competition law. The Council thus granted an exemption for a period of five years.

(iii) Ana Industries, as a distributor, notified an exclusive distribution agreement it had entered into with Samsung Electronic (Republic of Korea) for products under Samsung licence. Romania's Competition Council decided that the agreement: (i) did not eliminate competition as there were on the market numerous competing products supplied by different importers; and (ii) did not prevent other importers from acquiring Samsung products on the international market and selling them in the country.

2. ***Excessive pricing and abuse of dominant position***

(a) Argentina

Argentina's Radio and TV Services of the National University of Cordoba accused Durford Commercial Corporation (Panama) of charging excessive prices for the TV broadcasting of the final matches of the World Football Cup 1998. Durford had acquired the broadcast rights in Argentina of the above-mentioned matches and subsequently sold such rights to several (private) cable television networks. Radio and TV Services of the University of Cordoba, which was a public network, thus found itself deprived of the possibility of broadcasting the football matches.

In examining the complaint, Argentina's National Commission for the Defense of Competition considered the case in the light of three basic questions: (i) whether the general economic interest was affected by the granting of TV broadcasting rights only to cable television networks; (ii) whether an abuse of dominant position resulted therefrom; and (iii) whether the problem could be overcome by the application of competition-policy mechanisms.

The CNDC's decision pointed out that, even though the general economic interest would be adversely affected by such practice (as the audience would be restricted by the above-mentioned practice), the prejudice could not be attributed to an abuse of dominant position by Durford Commercial Corporation: while it is true that Durford was the only distributor of TV broadcasting rights, it had competed with other candidates in order to obtain such rights. The CNDC added that, as a result, a large part of the rent secured by Durford had likely been absorbed by the process of acquisition of the rights and would likely accrue instead to the national football associations of several countries.

The CNDC added that, even if there was prejudice to the general economic interest, such a prejudice could not be overcome by the application of competition rules. The source of the problem was the existence of a natural monopoly due to the type of the broadcasting, the solution to which could only be secured by a decision to make compulsory the open TV broadcasting or the free access to all chains of certain TV programmes.

The CNDC thus decided to accept the explanations of Durford but, at the same time, suggested that the State could formulate in the future a new norm aimed at ensuring permanently, at the national level, the free broadcasting of major sporting events. The CNCD's view was shared by the Secretary of Industry, Commerce and Mining.

(b) United States

On 23 June 1998, the United States Court of Appeal in Washington overruled an earlier ruling which favoured the United States Government in an antitrust action against the Microsoft Corporation. The Court's judgement concerned the United States Justice Department's 1997 suit, which claimed that Microsoft was breaking the terms of a consent decree signed in 1995. By its decision, the Appeal Court in Washington lifted a preliminary injuction which restricted Microsoft's packaging of browser software with its flagship Windows operating system. The 1995 consent decree settled the United States Antitrust Division's allegations that Microsoft had engaged in certain anticompetitive practices. The

decree terminated licensing practices that Microsoft had allegedly used to maintain dominance in personal computer operating systems in violation of the Sherman Act.

In October 1997, the United States Government commenced a civil contempt proceeding to enforce the decree. The Antitrust Division asserted that Microsoft had been violating the "anti-tying" provision of the order by requiring that OEMs distribute its web browser with new personal computers.

While the district judge found insufficient evidence to hold Microsoft in contempt, he concluded that the parties should have six months to conduct before a special master, who would then make recommendations to the court regarding the need for a permanent injunction.

The court also held that, since there were questions of law and fact yet to be determined, a preliminary injunction is the most appropriate remedy to maintain the *status quo* and to give the Court the opportunity to fashion a remedy. Microsoft, appealing against the judge's rulings, contended that there was inadequate notice of contemplated relief, no evidentiary hearing and insufficient facts to support the District Court's findings.

The Appeal Court reversed the District Court's preliminary order requiring that Microsoft's Windows operating system and its Internet Explorer product be offered separately to computer makers who want them that way. The Court cited procedural errors, including the District Judge's failure to give Microsoft the right to contest the injunction, and errors in interpreting provisions of the 1995 decree. The Court strongly backed Microsoft's arguments that bundling its Internet Browser with Windows was a technological improvement for consumers.

"Antitrust scholars have long recognised the undesirability of having courts oversee product design, and any dampening of technological innovation would be at cross-purposes with antitrust law," the Court said.

The Appeal Court's decision is likely to have a significant impact on the outcome of another very important antitrust lawsuit launched by the United States Justice Department and 20 states against Microsoft in May 1998. This accuses Microsoft more broadly of acting as an illegal monopoly by using the dominance of Windows to crush competition from Netscape Communications -- its Internet rival.[16]

C. **Horizontal RBP cases**

(a) United States

In this case, the largest United States producer of graphite electrodes pleads guilty and agrees to pay a US$110 million fine to settle United States Antitrust Division charges of participating in an international cartel to fix the price and allocate the volume of graphite electrodes sold in the United States and elsewhere. According to a plea agreement filed in the United States District Court for the Eastern District of Pennsylvania on 4 July 1998, UCAR International Inc., a Delaware corporation with headquarters in Danbury, Connecticut, agreed to pay the above-mentioned sum, which is the largest fine in antitrust history.

According to the United States Antitrust Division, the participation of UCAR International in an international price-fixing cartel was started in 1992 and continued until at least June 1997. This company, which is one of the two largest producers of graphite electrodes in the world, conspired with unnamed co-conspiritors to fix prices and allocate their market shares for graphite electrodes in the United States and elsewhere.

UCAR International and its alleged co-conspirators:

- participated in meetings and conversations in the Far East, Europe and the United States to discuss prices and volumes of graphite electrodes;

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[16] See *Wall Street Journal* and *Financial Times* of 24 June 1998, as well as Antitrust & Trade Regulation Report of 23 April 1998.

- Agreed during those meetings to increase and maintain prices of graphite electrodes;

- Agreed to eliminate discounts from the fixed price of graphite electrodes;

- Agreed to allocate the approximate volume of graphite to be sold;

- Agreed to divide the world market among themselves and to designate on a region-by-region basis, including the United States, the conspirator who would fix the price that the others would follow;

- Agreed to restrict capacity for producing graphite electrodes;

- Agreed to restrict non-conspirator companies' access to certain graphite electrode manufacturing technology;

- Discussed methods to conceal the agreement, including the use of code names by the corporate conspirators;

- Exchanged sales and customer information to monitor and enforce the agreement; and

- Issued price announcements and price quotations in accordance with the illicit agreements.

During the term of conspiracy, graphite electrode customrs experienced significant price increases that far outpaced the rate of inflation.[17]

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[17] Antitrust & Trade Regulation Report (ATRR), Vol. 74, 9 April 1998.

(b) Pakistan

In 1998, Pakistan's Monopoly Control Authority conducted an inquiry into a simultaneous and uniform price increase in cement allegedly due to cartel-like behaviour by the country's cement manufacturers. These manufacturers justified the price increase on the grounds that it was no longer financially possible for them to maintain the previous sale prices since input prices had increased, thus putting the sale price of cement below production costs. Therefore, according to the manufacturers, the price increase responded to market conditions and not to a collusive agreement among them. The stance taken by the cement manufacturers was contested by the Association of Builders and Developers (ABAD), which argued that there had been no increase in the prices of inputs which could have justified the price increase of the final product. ABAD stressed that, in its view, the price increase was the result of a collusive agreement but, at the same time, recommended a reduction in excise duties and an increase in export-related incentives as a means of bringing down cement prices. The Authority, in its turn, did not find merits in the manufacturers' assertion that input prices had increased since, it argued, some of such prices had been reduced as had the level of taxation.

The Monopoly Control Authority then focused its inquiry on two major issues: first, whether there existed an unreasonably restrictive trade practice; and second, whether any action was required to reverse any contravening practices.

In the light of these two major concerns, the Authority asserted that:

(i) there was sufficient circumstantial evidence indicating the existence of an unwritten agreement among the cement manufacturers. (The price increase was uniform and announced almost at the same time across the board); and

(ii) fixing a sale price at a higher level and limiting the production to maintain an artificial high sale price cannot be regarded as an act aimed at protecting the interests of the consumer.

The Authority then concluded that the price increase was determined through cartel formation and was against consumers' interests. The Authority recognized, however, that in view of the importance of cement production for domestic economic development -- in particular in view of its contribution to employment and to Government revenue -- the interests of the cement industry should not be unnecessarily hurt by the action to be taken by the Authority.

In its ruling, the Authority directed the cement manufacturers to break the cartel, reverse the cement prices to previous levels and remove any restriction on their utilization of capacities.[18]

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18 Pakistan's Monopoly Control Authority, case F. No. 2(274 ENQ (CAO-R & 1) MCA/96-98.